NO. 45721-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT DOUGLAS STARGEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh, Judge

No. 13-1-00847-7

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in admitting a photomontage identification where the photos match the description provided by the witness and his testimony has been shown to have sufficient indicia of reliability?

2. Where the State provided adequate evidence--including purchase price, length since purchase, and evidence the items functioned--from which the jury could infer the market value of stolen items, has the State met its burden of proof that the value totaled more than $750?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant Scott Stargel ("defendant") was charged with one count of theft in the second degree and one count of vehicle prowling in the second degree. CP 1-2. The defendant made a motion to suppress evidence of the photographic identification and exclude any in-court identification. CP 5-17. The trial court denied the motion. 1RP 39.[1]

After the State rested its case-in-chief, the defendant moved to dismiss the theft charge alleging that the State did not provide sufficient

[1] The verbatim report of proceedings will be referred to by the volume number followed by the page number (#RP #).

evidence of value. 2RP 101. The trial court denied the motion. 2RP 106. The jury found the defendant guilty as charged. 3RP 43. The trial court sentenced the defendant to a standard range of three months for Count I.[2] 5RP 13; CP 74-83. Due to mitigating factors, the court converted the sentence into 40 hours of community service, seven days in custody for time served, and the remainder on Electric Home Monitoring. *Id.* For Count II, the court sentenced defendant to 364 days, suspended for two years. CP 91-95. The defendant filed this timely appeal. CP 90.

2. Facts

On April 15, 2011, Dalton Hembroff was a student at Pierce College studying for his final exams. 2RP 24. Hembroff went to get lunch at a Subway in Puyallup at around 1:30 in the afternoon. 2RP 24. After getting out of his truck, Hembroff made eye contact with a man who seemed suspicious to him. 2RP 27. The man was standing in front of a blue car parked next to Hembroff's truck. 2RP 29-30. Hembroff entered the Subway despite his unease because "There's security cameras there and my vehicle was locked. I felt safe." 2RP 51. Hembroff identified the defendant in court as the man he made eye contact with. 2RP 27.

After being in the Subway for a "couple of minutes," Hembroff came outside, unlocked his truck, and realized his backpack and a package containing a brand new umpire jacket were gone. 2RP 29. Hembroff

[2] With an offender score of 3, the standard range sentence was two to six months.

testified that the umpire jacket was worth $100. 2RP 25. The backpack contained two textbooks worth $80 to $100 each and a laptop he had purchased for $900 less than a year before the theft. 2RP 26.

Hembroff got into his truck as the blue car--which the defendant was driving--pulled out of the parking lot. 2RP 29-30. Hembroff decided to follow the defendant because he was pulling out of the parking lot "pretty briskly." 2RP 30. The pursuit began with normal driving conditions, then with speeds above legal limits. 2RP 31-32. Hembroff called 911, and the operator asked him to stop following the blue car and meet an officer back at the scene of the crime. 2RP 32.

Hembroff described defendant to the responding officer as a white male, approximately 30 years of age, with tanned skin, six feet tall, 180 pounds, dirty or scruffy, and with either short or brown hair. 2RP 75. The State later introduced defendant's driver's license, which provided information matching the description given by Hembroff. Ex. 1; 2RP 76-77.

Hembroff collected surveillance footage from the adjacent Pitstop and gave it to the Puyallup Police Department. 2RP 35, 41. The jury saw the footage which showed the man Hembroff identified as the defendant removing something from the trunk of the blue car, approaching Hembroff's truck, opening the locked passenger door, removing items from the truck, getting back into the blue car, and driving away. Ex. 6; 2RP 38-40.

Nine months after the incident, Hembroff was contacted by the Puyallup Police Department for a photo lineup. 2RP 42. The detective who conducted the photomontage identification estimated that it took Hembroff a minute or less to identify the defendant. 2RP 99. Hembroff testified minor differences in the camera angles and background had no effect on his ability to pick the defendant's picture. 2RP 46. He did not notice any difference in background color, and the neck tattoo in the photo was not significant as he did not see a tattoo at the time of the crime. 2RP 46.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS HEMBROFF'S IDENTIFICATION BECAUSE THE PHOTOMONTAGE WAS PERMISSIBLE.

When assessing whether the admission of a photomontage identification by a trial court is proper, there is a two-step test. First, the defendant must show that the identification procedure was impermissibly suggestive. ***State v. Kinard***, 109 Wn. App. 428, 433, 36 P.3d 657 (2001); ***State v. Barker***, 103 Wn. App. 893, 905, 14 P.3d 863 (2000). To be "suggestive" requires that the procedure is "one that directs undue attention to a particular photo." ***State v. Eacret***, 94 Wn. App. 282, 283, 971 P.2d 109 (1999). Second, if the defendant shows the identification was suggestive, the court must decide if "the suggestiveness created a

substantial likelihood of irreparable misidentification." ***Barker***, 103 Wn. App. at 905, ***Kinard***, 109 Wn. App. at 433. Stated another way, the test requires a balancing of the possible harm of the suggestiveness against the reliability of the witness. ***State v. Booth***, 36 Wn. App. 66, 71, 671 P.2d 1218 (1983); ***State v. Springfield***, 28 Wn. App. 446, 447, 624 P.2d 208 (1981). Deference must be given to the sound discretion of the trial court; the test is "whether there are tenable grounds or reasons for the trial court's decision." ***State v. Kinard***, 109 Wn. App. at 432; ***State v. Harris***, 97 Wn. App. 865, 870, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017, 5 P.3d 10 (2000).

a. The photomontage was not impermissibly suggestive because the differences among the photos were too minor.

The photomontage presented to Hembroff was not impermissibly suggestive. In ***Simmons***, the Supreme Court of the United States enumerated several factors which may indicate a photomontage is suggestive: (1) the witness was only able to catch a glimpse of the criminal at the time of the incident, (2) the defendant's photo is the only one in the array matching the description of the criminal, (3) one picture is emphasized, and (4) the witness is told that police have other evidence that one of the people in the photo array committed the crime. ***Simmons v. United States***, 390 U.S. 377, 383-84. 88 S. Ct. 967, 970-71, 19 L. Ed. 2d 1247 (1968). ***Simmons*** further expressed concern over the trustworthiness

of courtroom identifications which occur after suggestive photomontage identifications. *Id.*

Washington courts have used the standards set forth in ***Simmons***, particularly whether the defendant's photo is the only one matching the description of the criminal and whether one photo is emphasized, to explore claims of impermissible suggestiveness. For example, in ***State v. Weddel***, the court evaluated the suggestiveness of a photomontage where the defendant's photo was 1/4 inch wider than the others and the six photos contained three different backgrounds--the defendant's background uniquely off-white with an electric panel showing. The court concluded that although the photomontage was not free of possible suggestiveness, it was not impermissibly suggestive. ***State v. Weddel***, 29 Wn. App. 461, 474-76, 629 P.2d 912 (1981). Hence, even a photograph that is larger with a distinctly different background may not be impermissibly suggestive.

Further, in ***State v. Vickers***, the court found a photomontage to not be impermissibly suggestive where the defendant's photo was the only DOL photo in the lineup, the background color was different, and he was the only man not wearing coveralls. Nonetheless, the court held these differences to be too minor considering the substantial similarities in coloring, age, and overall appearance. ***State v. Vickers***, 107 Wn. App. 960, 968, 29 P.3d 752 (2001), *aff'd*, 148 Wn.2d 91, 59 P.3d 58 (2002). Additionally, a photomontage has been deemed not impermissibly

suggestive even when the age and appearance of those pictured greatly varied. *See* ***State v. Hanson***, 46 Wn. App. 656, 731 P.2d 1140 (1987).

Here, the photomontage used by Puyallup Police pictured six men whose appearances matched Hembroff's description of the suspect: white male, approximately 30 years of age, tanned skin, scruffy, and with short or brown hair. Ex. 3. Overall, the ages and appearances of the men pictured are very similar. The defendant purports that his photo is slightly zoomed-in and the background colors of all six photos do not perfectly match, although his is not uniquely different. If true, these alleged differences are minor compared to the similarities among the photos. Further, these alleged differences are not as stark as those which ***Weddel*** and ***Vickers*** held were not impermissibly suggestive. Viewing the case at hand in light of the previous analyses done by Washington courts, defendant has failed to show the photomontage was not impermissibly suggestive.

b. <u>There is not a substantial likelihood of irreparable misidentification because Hembroff has shown a sufficient indicia of reliability.</u>

Even if the court does find the photomontage impermissibly suggestive, the trial court's admission of the photo should still be upheld because there is not a substantial likelihood of irreparable misidentification. In deciding whether a substantial likelihood exists, the factors for the trial judge to consider are: "(1) the opportunity of the

witness to view the criminal at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." ***Kinard***, 109 Wn. App. at 434. Further, it must be noted that an unchallenged finding of fact will be accepted as a verity on appeal. ***In re Contested Election of Shoessler***, 140 Wn.2d 368, 385, 998 P.2d 818 (2000); ***State v. Christian***, 95 Wn.2d 655, 656, 628 P.2d 806 (1981) (findings of fact entered following suppression hearing left unchallenged are verities on appeal).

An example of this analysis may be found in ***State v. Burrell*** where the court found that the impermissibly suggestive photomontage did not have a substantial likelihood of irreparable misidentification. In the photomontage, the defendant was the only one with an "afro" hairstyle as described by the witness. However, it was upheld because the witness observed the defendant in a well-lit area, provided an accurate description, and the identification occurred four days later. ***State v. Burrell***, 28, Wn. App. 606, 611, 625 P.2d 726 (1981).

In this case, the findings of fact and analysis of these factors done by the trial court was:

> (1) witness/victim Dustin Hembroff [sic] observed the defendant on two occasions and noted that the defendant appeared to [sic] suspicious to him; (2) Mr. Hembroff paid particular attention to the defendant because something felt amiss to Mr. Hembroff when he saw the defendant; (3) in all relevant points, Mr. Hembroff's pre-identification

> description of the defendant was consistent with the physical description of the defendant, and Mr. Hembroff chose the defendant from the photomontage; (4) Mr. Hembroff had a high level of certainty that he had chosen the correct person from the photomontage; and (5) 9 months passed between the time Mr. [H]embroff described the defendant and the time he picked the defendant out of the photomontage.

CP 85. The trial court found these factors, taken as a whole, did not constitute a substantial likelihood of irreparable misidentification. CP 86. Overall, the consistency, accuracy, and certainty of Hembroff's identification testimony was found to have a sufficient indicia of reliability; the trial court applied the test, weighed the factors, and did not abuse its discretion. Moreover, the defendant failed to object to these findings of fact, which precludes the review of these facts on appeal.

The evidence presented at trial supports the court's findings. Hembroff took particular notice of the defendant. He saw the defendant in broad daylight, made direct eye contact with him, and his description proved to accurately match the defendant on all relevant points. 2RP 27, 76-77; Ex. 1. Therefore, the trial court did not abuse its discretion when it found Hembroff's testimony had sufficient indicia of reliability to warrant a denial that there was a substantial likelihood of misidentification.

Furthermore, the veracity of Hembroff's identification was also tested by the jury. The first instruction the jury was given stated:

> You are the sole judges of the credibility of each witness. . . . In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or

> know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying . . . the reasonableness of the witness's statements in the context of all of the other evidence[.]

CP 44. The jury saw the surveillance footage and was able to determine for itself if the subsequent identification was reasonable. 2RP 36-40. The jury is the sole judge of witness credibility, and "[o]nly with the greatest reluctance and with clearest cause should judges--particularly those on appellate courts--consider second-guessing jury determinations or jury competence." ***State v. Kirkman***, 159 Wn.2d 918, 938, 155 P.3d 125 (2007). Therefore, the court should uphold the jury's determination that the identification of the defendant by Hembroff was credible.

The defendant asserts that the nine month period between the crime and the identification undermines the indicia of reliability, and therefore the court should hold there is a substantial likelihood of irreparable misidentification. However, the analysis of the time factor, taken with the remaining four factors, is left to the sound discretion of the trial court; the passage of time does not automatically disqualify an identification. In ***Neil v. Biggers***, the Supreme Court of the United States held a time lapse of seven months did not necessitate a finding of a substantial likelihood of irreparable misidentification where, when weighing all the factors, the identification was otherwise reliable. ***Neil v. Biggers***, 409 U.S. 188, 201, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). *See*

also ***State v. Cook***, 31 Wn. App. 165, 173, 639 P.2d 863 (1982) (finding a two month time lapse not impermissibly long). The passage of nine months, when considered with all other factors, did not affect the reliability of Hembroff's identification.

2. THE STATE PROVIDED SUFFICIENT EVIDENCE THAT THE ITEMS STOLEN FROM HEMBROFF'S TRUCK WERE VALUED AT MORE THAN $750.

In order for the court to find there was sufficient evidence on appeal it must determine that, after viewing the evidence in the light most favorable to the State, any rational jury could have found the defendant guilty beyond a reasonable doubt. ***State v. Green***, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Further, an insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. ***State v. Thereoff***, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); ***State v. Salinas***, 119 Wn.2d at 201.

The jury was instructed that, to convict the defendant of theft in the second degree, the following elements must be proved by the State beyond a reasonable doubt:

> (1) That on or about April 15, 2011, the defendant wrongfully obtained or exerted unauthorized control over property of another; and
> (2) That the property exceeded $750,

(3) That the defendant intended to deprive the other person of the property, and
(4) That this act occurred in the State of Washington.

CP 53; *see also* RCW 9A.56.040(1)(a). At issue on appeal is the second element: whether the State provided sufficient evidence that the items are valued at more than $750.

As stated in jury instruction number seven and RCW 9A.56.010(21), "value" refers to the market value of the property at the time and approximate area of the act. CP 51. The court has defined "market value" in Washington to mean "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." ***State v. Clark***, 13 Wn. App. 782, 787, 537 P.2d 820 (1975). When determining value, evidence of price paid is given great weight, and the jury may consider changes in the condition of the property that would affect its market value. ***State v. Hermann***, 138 Wn. App. 596, 602, 158 P.3d 96 (2007); ***State v. Melrose***, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). Further, it is not necessary that direct evidence of value is presented because reasonable inferences from substantial evidence may be sufficient. ***Melrose***, 2 Wn. App. at 831.

In the case at hand, a jury could have reasonably inferred from the evidence presented that the value of the items the defendant stole from Hembroff's truck were valued at more than $750. First, accepting all of the State's evidence as true, the total value of the items taken was $1,160. This exceeds the $750 threshold. Second, the umpire jacket stolen was valued

at $100 and the two textbooks for $80-100 each. Thus, although technology may depreciate in value, a reasonable jury could have inferred that a functional laptop purchased for $900 still be worth at least $500 less than one year later.

The defendant claims that the State did not present sufficient evidence of the laptop's value due to depreciation. To support his claim, he relies on ***State v. Ehrdardt***, where the court held that the State presented insufficient evidence of the condition or depreciation of stolen professional construction tools from which the jury could infer their market value. 167 Wn. App. 934, 946, 276 P.3d 332 (2012). The court in ***Ehrdardt*** found the evidence insufficient for some of the tools, but not others. A nail gun and rotary tools, which had seen heavy use in professional construction for three years, had undergone substantial depreciation. Yet the court also noted that, "the air compressor and pressure washer were essentially new, enabling the jury to find that their original cost was their current market value." *Id.* at 945.

Defendant's reliance on ***Ehrdardt*** is misplaced. It is reasonable to infer a laptop purchased within the last year is unlikely to see the same kind of depreciation as professional construction equipment sees in three years. Like the pressure washer in ***Ehrdardt***, the laptop had been recently purchased and was unlikely to have depreciated substantially. Therefore, it is consistent with ***Ehrdardt*** to find the jury's inference of the market value of the laptop reasonable.

D. CONCLUSION.

The trial court did not abuse its discretion in admitting the photomontage and subsequent in-court identifications. Additionally, the State provided sufficient evidence the value of the stolen goods was over $750, thus proving all required elements for theft in the second degree.

For these reasons, we ask the court to affirm the defendant's convictions.

DATED: JULY 21, 2014

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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